IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON PRESCRIPTION DRUG MONITORING PROGRAM, an agency of the STATE OF OREGON, Plaintiff,	No. 3:12-cv-02023-HA
vs.	January 15, 2014
UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, an agency of the UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Portland, Oregon

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ANCER L. HAGGERTY

UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

THE COURT: You can be seated.

This is the time set for summary judgment arguments in Oregon Prescription Drug. Yesterday the Court sent out an e-mail with some questions that I thought would aid in getting to the points the Court would like additional information on.

So with that, I'd like to start with Question No. 1, and we can have the State's attorney proceed in that fashion.

Is it going to be Ms. Potter?

MS. POTTER: Yes, it will, Your Honor. Thank you.

THE COURT: Okay.

MS. POTTER: And would you prefer me to stand or sit? I think the mics catch it better when I sit, but I'm happy to stand as well.

THE COURT: Actually, since we have no jury, I don't care if all counsel remain seated.

MS. POTTER: Thank you, Your Honor. And thank you for sending out the questions yesterday. It was -- it was nice to have a chance to think about them and do some research on some issues that the State hadn't previously addressed.

Looking at the case law that I found since

yesterday, essentially where we've arrived at is that I don't -- I don't find case law that compels a decision either that the Fourth Amendment prevents the use of administrative subpoenas or that the Fourth Amendment allows administrative subpoenas.

The cases that talk about Fourth Amendment cases are pretty limited to restrictions on administrative subpoenas that are only going after documents. There are a number of cases to that effect, including from the U.S. Supreme Court, but none of those cases get into the question of what happens when those subpoenas are going after documents that are entitled to privacy protections.

And I think certainly prescription records can be extraordinarily private, and that's why the State has put such careful protections on their collection and their retention by the State, because they are immensely private; and the ACLU has articulated some of the reasons why they can be so terribly private.

And at the same time I don't find cases suggesting that medical records, when they have passed through a doctor and then to a pharmacist and then from the pharmacist to the State, which has in its statutes limitations on the extent to which it will hold them -- there are provisions for when the State can release them, including the one that's at issue in our Complaint -- I

don't find cases suggesting that the Fourth Amendment is an absolute bar to the DEA using an administrative subpoena for certain records.

And I think ultimately what the Fourth Amendment requires is a case-by-case analysis of the specific records that are sought, the extent to which they are intruding into privacy, the scope of the records.

I found some cases that support that. Neither of them are controlling in Oregon. There's one from the Western District of Virginia and one from the Southern District of New York, and I've got copies for counsel and for the Court (handing).

And those cases, each of these cases suggests that there is -- The question under the Fourth Amendment is whether the disclosure sought is reasonable. And on page 11 of the Virginia case, which is *In re Subpoenas Duces Tecum Nos. A99-001 through 004* -- and that's 51 F.Supp.2d 726 -- on page 11 of the printout, the Western District of Virginia said that the Fourth Amendment protects against only unreasonable searches and seizures and that the Court should consider the need for the materials, the movant's expectation of privacy of the materials, the breadth of the request, the time period discovered -- or the time period covered, excuse me, the particularity with which the materials are described, and

the burden imposed by compliance. And it cites *U.S. v. International Business Machines* in support of that, which is a Southern District of New York case, which says essentially the same thing.

And I -- what that suggests to me is that in the -- with respect to an administrative subpoena, it does need to be a fact-specific, case-by-case inquiry as to whether there are Fourth Amendment protections applicable to the records. If there is a search for records relating to whether a physician is prescribing startling amounts of pseudoephedrine to a whole lot of patients who have the same last name, there may not be the same expectation of privacy for those records as there would be for records that would be looking at something like the hormones that would be related to transgender treatment.

So that supports the State's position that when the state Prescription Drug Monitoring Program receives these subpoenas, what we really need is a judge to look at it and assess, is this an appropriate scope for the subpoenas? Does it fall within the appropriate scope? I do think that the Fourth Amendment analysis is appropriate here. And the extent to which that analysis extends to limit the scope is going to depend on the records sought.

THE COURT: Okay.

MS. POTTER: Does that answer your question?

THE COURT: Mr. Danielson?

MR. DANIELSON: Your Honor, the Fourth Amendment does not preclude the use of an administrative subpoena. I mean, people have a -- in fact, in *Whalen v. Roe*, which is a very similar case, decided in, I think, 1977, where New York started this database of collecting prescription information, the Supreme Court said there is a liberty interest, but it is not a Fourth Amendment liberty interest, and they specifically found that.

And so relying on the Supreme Court holding, the Fourth Amendment does not protect -- absolutely protect medical records. In the Ninth Circuit case, *Tucson Woman's Clinic*, it set up a five-part test to determine the privacy interest in medical records. But it did not say that there's a Fourth Amendment right to medical records.

And the five-part test is met in this case, as we've explained in the briefs, Your Honor. It has to do with the type of information that's released, the potential for harm, the safeguards, and if there's explicit statutory authority allowing the kind of material to be released.

Here, Congress decided in the Controlled

Substances Act to give the administrative subpoena power to the DEA to investigate information that is relevant and material if they think something wrong is going on. So our position is there is no Fourth Amendment right to have all medical information protected, but there is a privacy interest based on a balancing test.

THE COURT: Okay. Is it Mr. Wessler?

MR. WESSLER: Yes. Good morning, Your Honor.

THE COURT: Good morning.

MR. WESSLER: I'd like to briefly address the points that Mr. Daniels just made, and then I'd like to turn back to what I think is the central concern animating this first question.

Whalen and *Tucson Woman's Clinic* and all of these other cases decided under the due process clauses, the Fourteenth and Fifth Amendment rights to informational privacy, have something to say relevant to the Fourth Amendment inquiry in this case, but the ultimate conclusion of those cases is completely irrelevant to the ultimate question under the Fourth Amendment.

Those cases apply a balancing test to determine whether the government's collection of information violates the right to informational privacy, and it balances the privacy interest in the information against the protections put in place by the government against

further dissemination or unintended access to that information.

Under the Fourth Amendment, the question is whether there is a reasonable expectation of privacy in an item or location. When there is a reasonable expectation of privacy, the warrant requirement applies unless one of the narrowly circumscribed exceptions to the warrant requirement, like exigency, applies; and those exceptions are not at issue here.

So in those Fourteenth Amendment cases, Courts have recognized that there is a privacy interest in medical records. In other circuits -- the Tenth Circuit, for example, specifically explained that there is a privacy interest in prescription records. And then they go on to this balancing test. And in *Whalen*, that involved looking at the protections the State of New York had against further dissemination or -- or theft of the information.

If we were challenging the ability of the State of Oregon to collect information in the PDMP, then *Whalen* might well be controlling. But what we're looking at now are the narrowly focused intrusions on individual privacy during the course of a criminal investigation by law enforcement. That's what the Fourth Amendment is directed at. And, in fact, *Whalen* specifically says that

it is not engaging in a Fourth Amendment analysis because that kind of intrusion is not at issue.

So now turning to what I think this first question is getting at, I think it's helpful to step back and look at first principles a little bit under the Constitution. And unconstitutional federal law cannot preempt anything. The supremacy clause is where the preemption doctrine derives from. And the supremacy clause provides that "This Constitution" -- I'm quoting -- "This Constitution and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land."

In other words, the supremacy clause applies only to those laws made in pursuance of the Constitution, only constitutional laws. The Supreme Court, I think in a couple of opinions, has spoken to this -- to this question of whether the supremacy clause can enforce a federal statute, a regulation, or a policy on the states when that statute or regulation is unconstitutional.

I would respectfully direct the Court to *Printz v. United States* -- that was decided in 1997; it's at 521 U.S. 898 -- and to *Alden v. Maine*, 527 U.S. 706, decided in 1999. Both of those cases explain in very clear language that the supremacy clause only applies to enforce a federal law against the states when that law is

made in pursuance of the Constitution.

Printz was about whether provisions of the Brady Act that sought to conscript local law enforcement into enforcing or carrying out some background check provisions could actually be enforceable against those local law enforcement officials. And the Court clearly stated that it had to look to whether that part of the Brady Act was constitutional before determining whether it -- it had binding effect on those local law enforcement agents. And the Court found that because those provisions of the Act violated state sovereignty and principles of federalism found throughout the Constitution, it was unconstitutional and therefore could not be binding.

So I think that the -- what I take to be the inquiry in this first question is whether this Court may and in fact should assess the constitutionality of the DEA's use and application of Section 876 during or before the preemption inquiry. And I think the answer to that is yes.

The use of that statute in the situation infringes upon a reasonable expectation of privacy that patients and doctors have in their prescription records and in the very confidential medical information that those -- those records reveal, which can reveal

somebody's illnesses, their diagnoses, their physician's confidential medical advice, their treatment decisions.

That's precisely the kind of information that the Supreme Court, in *Ferguson*, directed was covered by the Fourth Amendment and stated that there's a reasonable expectation of privacy, information like diagnostic test results. Here the prescription records can tell just as much about a person's underlying health as a test result itself.

And the Supreme Court's decision finds support in all the principles of medical confidentiality that have been binding on physicians and recognized by state evidentiary privileges for centuries, millennia even, in the particular privacy interest in types of information like transgender status, HIV/AIDS diagnosis, mental illness, in the increasing trend of states to protect this information in their Prescription Drug Monitoring Programs, and in all the other sources we cite in the brief.

And I guess my last note would just be that we take the -- the DEA's briefs in this case to not contest any of those -- those other sources of the reasonable expectation of privacy and only to argue about the force of those Fourteenth Amendment cases. You know, even putting those cases completely aside, I think it is quite

clear that this information is private and the Fourth Amendment fully applies.

THE COURT: Okay. Thank you.

If we can move on to Question 2, we'll go in the same order again.

Ms. Potter.

MS. POTTER: You know, on Question 2, Your Honor, I'm not sure that the State has a particular position on the intervenor's standing.

THE COURT: That's fine.

MS. POTTER: So I'm going to cede my time to the others.

THE COURT: All right. Mr. Danielson?

MR. DANIELSON: The question deals with the intervenors and standing. Standing is a fundamental precept of constitutional law, where there must be an actual case in controversy, Your Honor. The law is clear that for each claim brought by any party, they must have standing.

So the fact that they may have a subjective expectation of privacy, I mean, I think the Court could consider that as one of the factors, but nevertheless the Court has to go back and do an objective analysis as to whether they do have standing. And standing -- the test for standing is clear in the sense that it cannot be a

speculative. A speculative set of circumstances that might occur, that might create an injury, that does not lead to standing.

And so in this case, that's essentially what you have. You have four patients who have -- who are taking drugs that are between Schedules II and IV. And there are 7 million prescriptions annually taken into the PDMP database, 7 million prescriptions.

The intervenors have presented no evidence that their pharmacies are being investigated, their doctors are being investigated, that the DEA has any special interest in any of the drugs they are taking. So you do have to look at standing for each of the plaintiffs' claims. And they present no evidence except it's possible the DEA might investigate sometime; we don't know.

THE COURT: Mr. Wessler.

MR. WESSLER: The simple answer to this question is no. The concepts of standing under Article III and under the Fourth Amendment are completely distinct, and the Supreme Court has made that clear.

Under Article III a federal court has jurisdiction if there's a case or controversy before it. Here, at the very least, Oregon's initial complaint against the DEA creates a case or controversy. The State

is undisputed to have Article III standing here. And so regardless of whether intervenors are required to demonstrate standing independently -- and I can address that in a moment -- there is a case or controversy that's here properly before the Court.

The Supreme Court has explained that what has sometimes been called Fourth Amendment "standing" is actually more property subsumed under the Fourth Amendment analysis. *Rakas v. Illinois* I think is the case most on point. It's cited in our brief. In other words, there's no such thing as, quote, unquote, standing under the Fourth Amendment because that concept is the same and addresses the same questions as whether there is a reasonable expectation of privacy in the item or location to be searched.

And if a person has a reasonable expectation of privacy and the Government infringes on that expectation in the course of a search -- a search without a warrant, that is -- then that person has suffered -- has suffered a wrong under the Fourth Amendment and may -- may come into court to address their rights.

On the question of whether there is an effect on the intervenors' subjective expectations of privacy, you know, I think looking to the declarations of -- of each of the intervenors, the four patients and Dr. Roe, those

declarations explain very clearly that -- that all five of those individuals do have a genuine subjective expectation of privacy in their prescription records in the PDMP, and that expectation has a source in a number of places.

I mean, certainly it has a source in the embarrassment and the stigma that can come from disclosure of the very sensitive medical information that these people have, the fact of transgender status or even the stage of a transition from male to female pursuant to medication prescribed by a doctor after a diagnosis of gender identity disorder or gender dysphoria.

For John Doe 3, information about his mental illness, which he tries very hard to keep private, his anxiety disorder and his PTSD, it's I think quite understandable that would genuinely be thought to be private by these people.

But that subjective expectation also has a source in the general societal expectation that the information patients share with their doctors is protected by all of the rules and norms of medical confidentiality that have been in force for ages; and in this case, I think importantly, a source in the Oregon Legislature's considered and very clear determination that -- that records in the PDMP will be protected against search by

law enforcement unless law enforcement obtains a court order based on probable cause. That was, in my understanding, a "but for" cause of the passage of the legislation in 2009, inclusion of that protection. And that protection is -- is repeated in multiple places on PDMP's website and its public materials and certainly has helped form the actual expectation of privacy of these and other patients throughout the state of Oregon.

To just respond to -- to counsel's discussion of the need to demonstrate Article III standing, this Court has already granted intervenor's motion to intervene by applying the four-factor test that the Ninth Circuit sets out under Rule 24, and that is the only hurdle for intervention in a case like this.

The Ninth Circuit set out a very clear bright line rule: Intervenors need not possess the standing necessary to initiate a lawsuit. In other words, as long as those criteria under Rule 24 are satisfied and intervenors are joining an existing Article III case or controversy that is properly before the Court, there is no independent standing required. As our brief explains, the majority of circuits agree with this -- this view.

And the fact that the intervenors are -- are most explicitly raising an argument that the State of Oregon -- that's different than the State of Oregon's, an

argument that the Fourth Amendment, as opposed to under state law and the preemption clause, has no effect on that bright line rule, it does nothing to destroy the standing of the State of Oregon or to eliminate the case or controversy already here.

And I think particularly in light of the discussion we just had about the necessity of assessing the constitutionality of federal action before even getting into the preemption question, there's simply no reason for the Court to -- to even engage in an Article III standing analysis to the intervenors.

I'd be very happy later on to address why the doctor and patients here do have Article III standing should the Court decide to reach -- pass the Ninth Circuit's rule into that question, but I think I can leave that until later.

THE COURT: Okay. Question 3, Ms. Potter?

MS. POTTER: We don't believe it is problematic for the DEA to be forced to use warrants to gain access to the database.

THE COURT: All right. Mr. Danielson?

MR. DANIELSON: Congress -- Congress gave the DEA the power to investigate the CSA, Your Honor. And one of the tools it gave Congress was investigative subpoena power. It wanted to do that. It decided to do that

because it wanted the agency to be able to rapidly investigate possible violations of the law. It did not want to impose an obstacle to the DEA to investigate, and it did not want to impose a burden on the courts for every time the DEA wanted to do something, to have to go to court to get Court approval based on probable cause. If Congress wanted to do so, it clearly could have done so. It chose not to do so.

THE COURT: Okay. Mr. Wessler?

MR. WESSLER: It is our position that it is not problematic at all for the DEA to be forced to use warrants to access the confidential prescription records in the PDMA. That's what the Fourth Amendment requires.

And with respect, the DEA's argument here I take not as an argument but as bootstrapping. The fact that Congress has -- has legislated in an area doesn't mean that the Constitution falls away. The Fourth Amendment is the final word on what law enforcement may do in the course of an investigation when undertaking a search.

Now, to be absolutely clear, the question that we're raising here is not whether the DEA may obtain records from the PDMP; it's simply how it may do so. It may use -- it must use a warrant instead of an administrative subpoena. And that relief we're seeking we see as really quite modest.

To reiterate, under the Fourth Amendment, if there is a reasonable expectation of privacy in an item or location, law enforcement must secure a warrant before conducting a search. The Supreme Court has stated multiple times that the warrant requirement is not a mere inconvenience to be weighed against law enforcement's demands for efficiency, for example.

And, you know, the contention that -- that the DEA doesn't want to have to demonstrate probable cause to obtain this information because it wants to use this information to develop probable cause at a later stage in the investigation is -- it's just circular reasoning that I don't think has anything to say about the effect of the Fourth Amendment here.

You know, I'm sure that law enforcement would find it quite useful to -- to enter people's homes and conduct searches on a mere hunch rather than getting a warrant, in order to develop probable cause for an arrest or a later search, but that's not what's allowed. And law enforcement, as this Court well knows, applies for warrants all the time. Magistrate judges in this courthouse review applications and grant Rule 41 warrants on a daily basis.

You know, when the Oregon Legislature enacted the statute, it thought that law enforcement would be able to

do its job just fine using a warrant. It heard testimony from law enforcement, testimony from privacy advocates, from members of the public, came to that considered view. As far as I know, law enforcement in the state of Oregon is able to carry out its duties just fine. We see absolutely no reason why the DEA couldn't do so using a warrant as well.

MR. DANIELSON: May I respond to that briefly, Your Honor?

THE COURT: You may.

MR. DANIELSON: As the Controlled Substances Act is right now, the DEA can go to individual -- individual pharmacies. They can go to Walgreens, they can go to Rite-Aids, with an administrative subpoena and get the same information. There is no requirement of probable cause.

The only reason we're here is because the State of Oregon decided to create a database where all the information from all the pharmacies in the state is located. It makes it an easy way for the DEA to get it. But otherwise, they could clearly go to these pharmacies, one by one or chain by chain, and get the information, clearly without probable cause, just by submitting the administrative subpoena. It just makes it easier, more convenient, and faster for the DEA.

MR. WESSLER: Your Honor, could I make one brief -- brief response to that?

When the State of Oregon created this program, it did so with explicit protections on the privacy of the information in it, recognizing that -- that when the State collects this kind of very sensitive information from hundreds and thousands of sources and consolidates it in one location for a public health purpose, to provide doctors a way to -- to check their patients' records and make sure that a patient hasn't been getting prescriptions for a similar drug from another doctor, for example, or to refer them to treatment, the State considered the balances here and put in strict protections on law enforcement access.

The fact that the DEA may obtain records from pharmacies as part of a regulatory investigation under the administrative search exception to the warrant requirement I think doesn't say anything about whether patients with records in the PDMP have a reasonable expectation of privacy in those records.

Pharmacists understand that their business records may be reviewed in order to make sure that they're complying with the professional and legal obligations on them. But that -- patients in Oregon have not traded away any of their privacy interests in this

information merely by talking to their doctor about their underlying conditions, then bringing a prescription slip to the pharmacist, and taking home their necessary medications.

THE COURT: Okay. Let's charge the order and take No. 4, first with Mr. Danielson.

But going back to the premise you just stated, that the DEA could go directly to the pharmacies, if the pharmacies rejected the administrative subpoena, what would --

MR. DANIELSON: They would take them to court, Your Honor.

THE COURT: They would have to get a court order.

MR. DANIELSON: They would. But say the DEA -- under that same scenario, the Court has the power to hold the person receiving the subpoena in contempt unless they have some good reason not to comply.

THE COURT: Okay. Step 1 would be DEA goes to the pharmacy. And then say, hypothetically, that the pharmacy refuses. You then get a court order,, and it's only then, if the pharmacies refuse --

MR. DANIELSON: Correct.

THE COURT: -- the Court could hold them in contempt.

MR. DANIELSON: I believe so, Your Honor.

The subpoena is valid on its face when it's issued. The person receiving the subpoena is required to comply. If they refuse, they can go to court.

THE COURT: Well, I'm not certain they're required to comply.

But let's go on to No. 4.

MR. DANIELSON: You've asked a factual question, and I can -- I may need to supplement the record if you want a more specific answer, and the DEA would be happy to do so, Your Honor, because the question is "Has the DEA used material gathered through administrative subpoenas to the PDMP to investigate an individual that was later prosecuted? If so, have those individuals been advised of the fact that administrative subpoenas were used to gather evidence?"

In the vast majority of time, the administrative subpoenas are investigative tools used to -- used to investigate. They are used for administrative proceedings primarily. They aren't just used to investigate criminal cases. Usually the only reason the DEA would issue an administrative subpoena is based on information it already has of a possible violation. If an administrative subpoena is issued and complied with and they examine it and they see that it may lead to a criminal matter, then they would -- then they would

follow criminal procedures with either a grand jury subpoena or a search warrant or something more than that.

I'm assured by DEA that -- I'm not going to give you a percentage, Your Honor, but the vast majority of the time they are used for administrative proceedings, possibly to revoke somebody's license, whether it's a pharmacy or a doctor. But they are rarely used for criminal proceedings alone. I can't say that has never happened, but I can tell that you the vast majority are for administrative proceedings.

THE COURT: Anyone else wish to speak?

Ms. Potter?

MS. POTTER: Your Honor, I can advise -- I spoke to my clients. I don't believe the PDMP has produced any records to the DEA under administrative subpoena only, but we have in response to a court order.

MR. WESSLER: I obviously can't answer the factual question, but I do think that there are a couple of points that bear mentioning, that inform an understanding of the DEA's answer.

One is just to keep in mind the breadth of the subpoenas that actually have been issued here. The three subpoenas that the DEA has sent to the PDMP, one was enforced by a magistrate judge in August of 2012, which sought six months of prescription records for one doctor.

A second, on September 11, 2012, sought individual patients' prescription records for a duration of time that's not publicly known. And the third sought a year's worth of records, prescription records of two different doctors.

All three of those subpoenas have prohibited -- explicitly on their face prohibit the State of Oregon from informing the subject of those subpoenas of their existence, of informing them that their records have been or are about to be subjected to a warrantless search by the Government.

So I think that, to my mind, it's important to know what the DEA's policy would be in at least three situations: What it would be if it obtained records about a physician or a patient, that those records confirm their suspicions, they indicted that individual, prosecuted them, would notice be given there? Would notice be given if they were prosecuted, but those prescription records from the PDMP were not actually introduced at trial as evidence? And would notice be given if the DEA obtained records of patients or doctors, but those records dispelled suspicion rather than confirmed it and the Government chose not to advance to a prosecution? There there would never even be the constructive notice of seeing the records introduced

against one at trial, and a person would be left totally at the mercy of a government violation that they had not received any notice of.

So I think those all speak to the importance of this Court hearing the case that's properly before it today and avoiding that kind of a perverse outcome where only people who are -- only the most guilty, so to speak, people would have redress for violation of their rights.

THE COURT: And if we can go to the last question, again, a change in order.

Mr. Danielson?

MR. DANIELSON: The question, Your Honor, is does this Court have authority to make the DEA's Section 876 subpoenas self-enforcing and isn't that what the DEA is asking this Court to do?

The answer is no, Your Honor, we are not asking the Court to make a subpoena self-serving. To repeat myself, they are valid when issued. When somebody refuses, we go to a Court to enforce them. That's the provision and procedure that Congress provided for.

THE COURT: Okay. Ms. Potter?

MS. POTTER: Your Honor, yes, the Court -- I believe the Court does not have the authority to make the administrative subpoenas self-enforcing. The case law that we've cited in our briefs over and over supports

that the recipient of an administrative subpoena has the right to challenge the subpoena and go to court and have the judge take a look at it and review it before we just start turning over records.

THE COURT: Mr. Wessler?

MR. WESSLER: We agree with the State's position on this. At the very least, even if a subpoena is proper as a general matter, by which I mean even if there was no reasonable expectation of privacy in the item or location that it seeks to enter, there's still a reasonableness requirement imposed by the Fourth Amendment.

And the Ninth Circuit has explained this multiple times, most recently I think in *Golden Valley*. But the subpoena can't be too indefinite; it must be reasonably relevant to the underlying investigation; it can't be unduly burdensome or overly broad. And any time the State has a good faith reason to challenge a subpoena at least on those grounds, it has a right under the Fourth Amendment to do so.

And a broad perspective ruling that subpoenas are always reasonable and appropriate under the Fourth Amendment or under the preemption clause based on the statutes, I think would -- would preclude the State from bringing those kinds of constitutionally required challenges.

THE COURT: Okay. I assume, Ms. Potter, you have some additional information we should put on the record in light of your poster boards.

MS. POTTER: That's correct, Your Honor.

THE COURT: You may proceed.

MS. POTTER: Thank you.

And, Your Honor, I will -- I will make that part of the discussion brief. And it is aimed at some of the things that we've been talking about here, and these are aimed specifically at the preemption question, that the Fourth Amendment certainly places limits on an administrative subpoena; and the extent of those limits, as I said earlier, I think are probably fact specific. I think that it requires the Court to take a look at what the administrative agency is looking for and the scope and the privacy rights at issue in assessing that.

The DEA has taken the position that Section 876, the Controlled Substances Act, just preempts the entire text of subsection (C) of the PDMP's statute, placing protections on these records. And our position is that rather -- even if the Court were to find that the Fourth Amendment does not have any probable cause requirement when it comes to administrative subpoenas served under the Controlled Substances Act, the only thing that does is this: It reads the "based on probable cause" out of

the statute.

The statute itself hangs together just fine without it. It still requires that the State disclose prescription drug monitoring information, only pursuant to a valid court order issued at the request of a federal, state or local law enforcement agency engaged in an authorized drug-related investigation, involving a person to whom the requested information pertains.

Now, that is very similar to exactly the factors that a federal court has to look at anyway when reviewing an administrative subpoena. It's whether Congress has granted the authority to investigate, whether procedural requirements have been followed, whether the evidence is relevant and material to the investigation.

These require essentially the same thing, with the addition of procedural requirements having been followed. And that question of whether the evidence is relevant and material to the investigation is going to be a fact specific question.

The case that -- where Judge Papak issued an order, the DEA submitted briefing showing this information is relevant to the material and the investigation. Judge Papak reviewed that and determined it was. That's appropriate. I think that's what Oregon law requires, because only the probable cause, at most,

is preempted by federal law.

And the State's position is that the PDMP has a positive legal obligation to hold on to the records until a Court has -- to challenge an administrative subpoena and to hold on to the records until the Court has reviewed the administrative subpoena and either ordered the records as requested or limited the request as the Court may determine appropriate.

And, secondarily, as discussed in our briefing, even if the Court were to find that the PDMP does not have a legal obligation under state law to wait for a court order before it discloses these private records, I think that they're not self-enforcing, these administrative subpoenas. And we would ask for, at a minimum, a ruling that the PDMP has the right to seek -- to challenge the administrative subpoena, to ask for a Court to review it, and to wait for that court order before it turns over confidential patient prescription records.

THE COURT: Mr. Danielson, anything additional?

MR. DANIELSON: Yes, Your Honor.

The State has admitted that the supremacy clause applies and that the "probable cause" term in that statute is removed. Under Oregon law, if the remaining parts of a statute remain after part of it is considered

unconstitutional, it can't continue if the original intent of the Legislature is not there.

Under Oregon law 431.966, the whole purpose of that statute, it says, "Pursuant to a valid court order, based on probable cause and issued at the request of a federal, state, or local law enforcement agency engaged in an authorized drug investigation involving a person to whom the requested information pertains" -- the whole purpose is for a Court to determine, based on all the specific facts and circumstances, that there is probable cause.

If you remove that "probable cause" term, there is nothing for the Court to do. It would see an order from an agency asking for information. There would be nothing for the Court to do, nothing for the Court to weigh. And so we do believe it is preempted.

THE COURT: Mr. Wessler?

MR. WESSLER: Our position is that this Court doesn't need to even engage in the preemption question because the application of the statute by the DEA does violate the Fourth Amendment and is unconstitutional, and so as I think we -- we discussed at enough length, it can preempt nothing.

So I'd like to respond to a couple points and then make just a few more points about the Fourth

Amendment privacy interest and the application of the Fourth Amendment here.

First, just to respond and maybe put our own finer point on -- on Ms. Potter's point that that limits on subpoenas are fact specific, that is true, I think. But I think it's true in two separate respects, both of which may be relevant here.

As to that reasonableness inquiry under the Fourth Amendment, when a warrant is not required, then that -- that will certainly be fact specific in looking to how broad a request it is, how burdensome it would be to comply with.

But what's relevant to the substantive Fourth Amendment issue here is the nature of the records at issue; and that's fact specific in the sense that we're talking about prescription records in the PDMP, and all the facts in the record about those are before the Court. And the Court is quite appropriate, I think, to -- to reach a decision about the proper applicability of administrative subpoenas to those kinds of records.

You know, the home is a private space for purposes of the Fourth Amendment. A warrant is required. But when Courts are reviewing searches of the home without a warrant, Courts have never looked to whether the Government is seeking a diary or a firearm or a kilo

or cocaine. The determination is, at the first stage, whether there's a reasonable expectation of privacy in that location or in the item to be searched. And if there is, the warrant requirement applies.

The second point is just to -- to turn for a moment back to the distinction between the Fourteenth Amendment and the Fourth Amendment cases, *Whalen* and its progeny under the Fourteenth Amendment, and *Ferguson* and all the other cases, like *Katz*, that have -- have in great detail over the years set out the reasonable expectation of privacy test.

The Fourth Amendment applies to situations where the Government is engaging in a particularized criminal investigation. The types of exercises of state power are quite different in the two contexts, quite different when on the one hand a state is gathering together records for some kind of administrative purpose or a public interest purpose -- here to advance public health by providing tools to doctors and pharmacists -- versus when the State is engaging in particular criminal law inquiries into a person's conduct and infringing their privacies in that than context.

That is exactly the harm or the dynamic that the Fourth Amendment was intended to address, and that is why the Fourth Amendment requires that the Government must go

to a neutral magistrate, demonstrate probable cause, and obtain a warrant permitting them to enter into the space or to seize the records that are private.

On the Fourth Amendment analysis, you know, I think we've, between the briefs and this morning, touched enough on the reasons why the information we're talking about is private Fourth Amendment purposes. But I just want to -- to address for a moment the argument that the DEA makes under the third-party doctrine, suggesting that -- that the mere fact that a person has gone to their physician and shared private medical information with their physician in a privileged and confidential communication and then taken the physician's confidential medical advice to the pharmacist to get necessary medical care, and then that pharmacist is compelled by statute to report that information to a secure safe database, with clear limits on dissemination and law enforcement use, that does nothing to erode the patient's subjective or objective reasonable expectation of privacy in their prescription records.

And I think the idea that a person must choose between protecting their health and protecting their privacy is wrong and is frankly offensive to the entire purpose of the Fourth Amendment.

So *United States v. Miller* is the case that the

Government cites, the DEA cites in support of its argument that the third-party doctrine applies. And *Miller* directs two dimensions of inquiry, to determine whether the mere fact that a third party has possession or access to records eliminates somebody's privacy interest in them. The first is how private the information is and the second is whether it was voluntarily shared.

And this case is -- even assuming that *Miller* is still good law in today's increasingly digital age -- and the Supreme Court has called that into question in *Jones* and other cases -- but even assuming that it is, it's distinguishable on both of those dimensions.

As we've discussed, the kind of records are extraordinarily private, revealing the most sensitive medical facts. And, importantly, *Miller* itself, in footnote 4 of the opinion, explains that information covered by evidentiary privilege -- the example it gives is the attorney-client privilege, but the doctor-patient privilege is equally apt -- information covered by an evidentiary privilege is simply outside the scope of the Court's opinion.

You know, I think it's common sense that a person who goes to their attorney, shares confidential information, which the attorney then writes down in his

or her business records and stores in their filing cabinet, it's still considered private for Fourth Amendment purposes, and the Ninth Circuit has held as much.

We cite -- the case is *DeMassa v. Nunez*, which the Ninth Circuit decided and explained just that, that the mere fact that a physician holds client records -- I'm sorry, that an attorney holds client records doesn't eliminate the privacy interest. The same must be true of the confidential medical records at issue here.

On the other dimension, whether the information is voluntarily shared, it's also distinguishable, I think. You know, a person going to a doctor to obtain necessary medical care, to a physician to get a prescription to treat the problem hasn't given up anything by -- by seeking that aid.

THE COURT: Okay. I thank you. And we'll take the matter under advisement and hopefully getting a ruling out fairly soon.

We'll be in recess.

MR. WESSLER: Thank you, Judge.

MS. POTTER: Thank you, Your Honor.

MR. DANIELSON: Thank you.

(Proceeding concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Nancy M. Walker *3/12/14*

NANCY M. WALKER, CSR, RMR, CRR DATE
Official Court Reporter
Oregon CSR No. 90-0091